IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NERITZA ANDUJAR IGLESIAS **Plaintiff** **v.** **D'MART INSTITUTE, INC.** **Defendant**	**CIVIL NO.** 09-1918 (JAG)

OPINION AND ORDER

GARCIA-GREGORY, D.J.

Before the Court stands defendant D'Mart Institute, Inc.'s ("D'Mart") motion for summary judgment. (Docket Nos. 44 and 46). The Court referred D'Mart's motion to Magistrate Judge Velez Rive for a Report and Recommendation. The Magistrate recommended that the summary judgment motion be denied. (Docket No. 96). D'Mart timely objected to the Report and Recommendation. (Docket No. 98). For the reasons stated below, the Court **ADOPTS** the Magistrate's Report and Recommendation and the motion for summary judgment is hereby **DENIED**.

BACKGROUND

Plaintiff Neritza Andujar Iglesias ("Andujar") filed a complaint against D'Mart alleging employment discrimination on account of her gender and pregnancy, as well as retaliation. Andujar filed her claim pursuant to Title VII, 42 U.S.C. 2000e *et seq*. Andujar also invoked pendent jurisdiction pursuant to 29 L.P.R.A. §469 *et seq*., §146 and 1321, *et seq*. (state anti-

discrimination statutes), tort and the state constitution. (Docket No. 1).

The Court referred D'Mart's summary judgment motion to Magistrate Velez Rive for a Report and Recommendation. The Magistrate determined that the motion for summary judgment should be denied. D'Mart objects to the Magistrate's conclusion on several grounds: a) the Magistrate Judge erred when she determined that Andujar's affidavit was sufficient to defeat its summary judgment motion; b) the Magistrate erred when she determined that Andujar was an employee and not an independent contractor; c) the Magistrate erred when she determined that Andujar established a *prima facie* case of discrimination based on pregnancy; d)the Magistrate erred when she concluded that the proffered reason for the employment termination is disputed; and e) the Magistrate erred when she determined that there are genuine issues of material fact in dispute.

STANDARD

A. Motion for Summary Judgment

A motion for summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure, which entitles a party to judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party." Prescott v. Higgins, 538 F.3d 32, 40 (1st Cir. 2008) (internal citations omitted); Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004) (stating that an issue is genuine if it could be resolved in favor of either party); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-250 (1986). In order for a disputed fact to be considered material it must

have the potential "to affect the outcome of the suit under governing law." Sands v. Ridefilm Corp., 212 F.3d 657, 660-661 (citing Liberty Lobby, Inc., 477 U.S. at 247-248); Prescott, 538 F.3d at 40 (citing Maymi v. P.R. Ports Auth., 515 F.3d 20, 25 (1st Cir. 2008)).

The ethos of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997)(citing FED. R. CIV. P. 56 (e) advisory committee note to the 1963 Amendment). The moving party must demonstrate the absence of a genuine issue as to any outcome-determinative fact on the record. Shalala, 124 F.3d at 306. Upon a showing by the moving party of an absence of a genuine issue of material fact, the burden shifts to the nonmoving party to demonstrate that a trier of fact could reasonably find in his favor. Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The nonmovant may not defeat a "properly focused motion for summary judgment by relying upon mere allegations," but rather through definite and competent evidence. Maldonado-Denis v. Castillo Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994). The nonmovant's burden thus encompasses a showing of "at least one fact issue which is both 'genuine' and 'material'." Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990); see also Suarez v. Pueblo Int'l, 229 F.3d 49, 53 (1st Cir. 2000) (stating that a nonmovant may shut down a summary judgment motion only upon a showing that a trial worthy issue exists). As a result, the mere existence of "some alleged factual dispute between the parties will not affect an otherwise properly supported motion for summary judgment." Liberty Lobby, Inc., 477 U.S. at 247-248. Similarly, "summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and

unsupported speculation." Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

When considering a motion for summary judgment, the Court must examine the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor in order to conclude whether or not there is sufficient evidence in favor of the nonmovant for a jury to return a verdict in its favor. Rochester Ford Sales, Inc. v. Ford Motor Co., 287 F.3d 32, 38 (1st Cir. 2002). The Court must review the record as a whole and refrain from engaging in an assessment of credibility or weigh the evidence presented. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 135 (2000)(internal citations omitted). The burden placed upon the nonmovant is one of production rather than persuasion. In other words, in weighing a nonmovant's opposition to summary judgment the Court should not engage in jury-like functions related to the determination of credibility.

B. Motion for Reconsideration

Pursuant to 28 U.S.C. § 636(b)(1), Fed.R.Civ.P. 72(b), and Local Rule 159, a district court may refer dispositive motions to a United States magistrate judge for a report and recommendation. The adversely affected party may contest the report and recommendation by filing objections within fourteen days of being served with a copy of the order. 28 U.S.C. § 636(b)(1). If objections are filed in a timely manner, the district judge shall "make a *de novo* determination of those portions of the report or specified findings or recommendation to which [an] objection is made." Rivera-De-Leon v. Maxon Eng'g Servs., 283 F.Supp.2d 550, 555 (D.P.R. 2003). A district court can "accept, reject, or modify, in whole or in part, the

findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

ANALYSIS

A. Andujar's Affidavit

D'Mart strongly objects to the Magistrate's conclusion that summary judgment be denied. D'Mart argues that the Magistrate improperly relied on Andujar's declaration under penalty of perjury in reaching her conclusion. According to D'Mart, Andujar's declaration should not be considered at all by the Court because it is a sham affidavit.

The sham affidavit doctrine "states that a party may not attempt to artificially create an issue of fact in order to prevent summary judgment by filing an affidavit that contradicts its prior testimony." Rivera–Rocca v. RG Mort. Corp., 535 F.Supp.2d 276, 285 n. 5 (D.P.R. 2008). Therefore, a court may disregard portions of the affidavit containing unexplained inconsistencies between the affidavit and the affiant's prior deposition. Melendez-Ortiz v. Wyeth Pharmaceutical Co., 775 F.Supp.2d 349, 365 (D.P.R. 2011)(citing Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 4–5 (1st Cir. 1994)).

D'Mart argues that Andujar's declaration under penalty of perjury (Docket No. 53-2) contradicts the contract between the parties (Docket Nos. 91-14 and 91-1). The Court finds this argument unconvincing. D'Mart cites to service contracts for the proposition that they contain specific language that establishes that Andujar was an independent contractor. However, Andujar's affidavit states that in practice the contracts were not applied according to their terms. The Court is unable to conclude that Andujar was an independent contractor merely because the service contracts describe the position as such.

D'Mart further argues that Andujar's affidavit (Docket No. 53-2) is in direct conflict with the testimony provided by her

during her deposition (Docket No. 67-13). Essentially, D'Mart states that in her deposition Andujar stated that that she only requested a medical certificate on a couple of occasions and that in her affidavit Andujar states that every time that she had a medical appointment she had to bring a medical certificate. The Court does not find these statements to be contradictory and accordingly finds D'Mart's argument unavailing. Andujar's statements in her deposition may be confusing, however, in that they do not readily contradict the statements in her affidavit.

D'Mart proceeds to point out a discrepancy between Andujar's statements during her deposition and the statements in her affidavit. In her affidavit, Andujar states that she did not testify that Ms. Viera asked her to reconsider her decision of not signing the contract. In her affidavit, Andujar posits that Ms. Viera told her that she had to sign the contract and did not have a right to maternity leave. (Docket No. 53-2). D'Mart argues that this is in direct conflict with her statements during deposition (Docket no. 67-13 at p. 14). The Court agrees that there appears to be some conflict. During her deposition, Andujar stated that Ms. Viera told Andujar that she should "really think it over." However, it is not readily apparent how this possible contradiction invalidates Andujar's affidavit in its entirety.

D'Mart proceeds to target other statements in Andujar's affidavit. Specifically, D'Mart states that Andujar's affidavit at paragraph 60 is in conflict with her statement of material facts. (Docket No. 53). The Court is unclear about how these two statements are in conflict. Without more from D'Mart, the Court is unable to properly conclude that there is a contradiction between these statements.

D'Mart makes the same argument regarding Andujar's statement at paragraph 64 of her affidavit. D'Mart posits that this statement is in direct conflict with her deposition. (Docket No. 67, p. 44). Again, the Court fails to see how these statements are in conflict. D'Mart does not help matters by making general arguments that do not seem to hold up under scrutiny. Thus, in the absence of any sort of argument on D'Mart's part, aside from claiming that various statements are contradictory, the Court is simply unable to agree.

D'Mart's next argument enjoys even less clarity than its previous averments. D'Mart posits that paragraphs 3,4,5,7,8,10,11,12,14,48,54, and 78 of Andujar's affidavit must be disregarded because these statements were not made during the deposition. It seems that D'Mart is asking the Court to extend the sham affidavit doctrine. In other words, D'Mart objects to various statements because they were not mentioned in the deposition. D'Mart attempts to bolster its argument by claiming that these enumerated statements contradict the service agreement between the parties. The Court is rather perplexed by this line of argument and concludes that it provides insufficient information that would assist the Court in concluding that Andujar's affidavit is a sham.

D'Mart proceeds to argue that paragraph 57 of Andujar's affidavit should not be considered because it is not based on personal knowledge. Paragraph 57 states that Mrs. Rivera mockingly told Andujar that she expected her to be fatter due to her pregnancy. In her affidavit, Andujar states that Mrs. Rivera's comment was made to communicate that she was not happy with Andujar's pregnancy. D'Mart posits that this statement should be disregarded because it is not based on personal knowledge. D'Mart also argues that paragraph 57 should be disregarded because it conflicts with pages 11 and 16 from

Andujar's deposition. (Docket No. 67-13). Again, the Court finds no such contradiction. It is also unclear to the Court as to why Andujar is incompetent to testify regarding Mrs. Rivera's alleged statements.

Lastly, D'Mart argues that paragraphs 2,21,23,25,26,27,28 and 48 from Andujar's affidavit should be disregarded because they are not statements of fact. D'Mart does not provide any further explanation for its argument. The Court finds no reason to disregard any of these paragraphs.

In light of the foregoing, the Court finds no reason to conclude that Andujar's affidavit is a sham.

The Court notes that D'Mart's and Andujar's motions are exceptionally hard to follow due to counsels' penchant for citing to exhibits without providing the docket number. Counsel for both parties are hereby advised that in the future these unclear filings will not be tolerated.

B. Whether or not Andujar was an employee

D'Mart vehemently argues that Andujar was not an employee and as a result Andujar's Title VII claims are unable to gain traction. The terms "employer" and "employee" are defined under Title VII with reference to common law agency principles. Lopez v. Massachusetts, 588 F.3d 69, 83 (1st Cir. 2009). Additionally, the common law element of control serves as the principal guidepost that should be followed. Id. at 84-85. Other factors to be considered are "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work

is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." Speen v. Crown Clothing Corp., 102 F.3d 625 (1st Cir. 1996)(citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992)).

Andujar has presented sufficient issues of fact regarding her status as an employee. It is true that Andujar has introduced these issues of fact through her affidavit. However, the Court does not agree with D'Mart that the affidavit is a sham and should be disregarded. As a result, D'Mart is not entitled to *brevis* disposition on the claim that D'Mart was not Andujar's employer.

C. *Prima facie* case of discrimination based on pregnancy

D'Mart's next line of argument is that Andujar failed to make a *prima facie* case of discrimination. D'Mart's argument seems to be premised mostly on arguing that the second and fourth factors of the McDonnell Douglas balancing scheme were not met.

"To establish a *prima facie* case … [the plaintiff] must show that: (1) she was pregnant or indicated an intention to become pregnant and (2) she was qualified for the position; but (3) she suffered an adverse employment action when she was rejected (4) in favor of a similarly qualified individual." Rathbun v. Autozone, Inc., 361 F.3d 62, 71 (1st Cir. 2004). This burden is not onerous. Martinez-Burgos v. Guayama Corp., 656 F.3d 7, 12 (1st Cir. 2011). "Satisfaction of the *prima facie* burden creates a rebuttable presumption that discrimination prompted the challenged adverse employment action." Id. (citing Cumpiano v. Banco Santander P.R., 902 F.2d 148, 153 (1st Cir. 1990)). D'Mart may rebut this presumption by articulating a non-discriminatory reason for the adverse employment action. This

shifts the burden back to Andujar to demonstrate that the proffered reason is mere pretext. Martinez-Burgos, 656 F.3d at 12 (citing Smith v. F.W. Morse & Co., Inc., 76 F.3d 413 (1st Cir. 1996). The analysis regarding whether or not an employer's proffered reason is actually pretext for discrimination should focus on the perception of the decisionmaker. Mesnick v. Gen. Elec. Co., 950 F.2d 816 (1st Cir. 1991). In other words, the Court must focus on whether the employer believed its stated reason to be credible. Id. (citing Gray v. New England Tel. and Tel. Co., 792 F.2d 251, 256 (1st Cir.1986)). However, the employer's good faith is not automatically conclusive. Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40 (1st Cir. 2002). "Conversely, there may be pretextual explanations - ones not honestly believed by the decisionmaker - which do not lead to liability because the actual unadmitted reason still does not constitute discrimination." Id.

According to D'Mart, Andujar did not suffer an adverse employment action. D'Mart states that Andujar was simply not rehired upon her refusal to sign a contract. The Court disagrees with D'Mart and understands that Andujar has made a sufficient showing of a *prima facie* case of discrimination and retaliation. The facts at issue in this case are not quite as simple as D'Mart suggests. The record reflects that Andujar received a new contract and she refused to sign it because she understood that she had a right to maternity leave. Once Andujar refused to sign the contract, she was dismissed. The Court understands that this is sufficient to constitute an adverse employment action due to the failure to rehire her in light of the undemanding nature of the *prima facie* standard.

As to the fourth factor, the Court understands that the record reflects via Andujar's affidavit that Mr. Marcos Rolon

was hired to replace her. Thus, the Court finds that Andujar has sufficiently established a *prima facie* case of discrimination.

D'Mart proceeds to argue that even if Andujar has successfully satisfied the *prima facie* standard, D'Mart has rebutted any presumption of discrimination. D'Mart argues that its reason for dismissing Andujar was legitimate and therefore rebuts any presumption of discrimination.

D'Mart argues that even though Andujar names three different professors who were not fired despite their refusal to sign the same contract as Andujar, the Court should conclude that there was no discrimination in this case. D'Mart states that Mr. Juan Rodriguez, one of the professors who refused to sign the contract, should not be taken into consideration because Mr. Juan Rodriguez has been employed by D'Mart since 1998 and was not similarly situated to Andujar. D'Mart posits that two other professors, Mr. Edward Rodriguez and Mr. Juan Miranda, who refused to sign the same contract as Andujar did eventually sign their respective contracts. According to D'Mart, the fact that Mr. Edward Rodriguez and Mr. Juan Miranda eventually signed employment contracts should lead the Court to conclude that Andujar and these professors were not similarly situated.

D'Mart also alleges that nothing in the record sustains that individuals hired to provide services as an independent contractor continue their working relationship without signing a contract. The Court has already stated that there exists a genuine issue regarding whether or not Andujar was an employee. Moreover, D'Mart's argument that the Court should not take into account the fact that Mr. Juan Rodriguez, Mr. Edward Rodriguez, and Mr. Juan Miranda remained employed seems disingenuous. D'Mart's own motion admits that Mr. Juan Rodriguez has not signed a contract since 2004. Moreover, although Mr. Edward

Rodriguez and Mr. Juan Miranda did eventually sign employment contracts these were signed in May and June 2008, respectively. In contrast, Andujar, who refused to sign the same contract as Mr. Edward Rodriguez and Mr. Juan Miranda in January 2008, was immediately released from employment.

The Court has significant difficulty concluding that the decision to not rehire Andujar was the product of legitimate business reasons. Moreover, the Court looks at the evidence of discrimination not in "splendid isolation" but at the record in its entirety. Mesnick v. General Elec. Co., 950 F.2d 816, 824 (1st Cir. 1991)(stating that in the ADEA context courts will look at evidence of discrimination as "part of an aggregate package of proof offered by the plaintiff.") In light of the record, the short time span between Andujar's maternity status and D'Mart's decision not to allow plaintiff to work without a contract, the disputed facts as to the reasons for D'Mart's business reorganization, and Andujar's *prima facie* case the Court concludes that the grant of summary judgment would be improper at this stage.

D. The Magistrate's conclusion regarding genuine issues of material fact in dispute

Lastly, D'Mart posits that Andujar has failed to demonstrate that a trial-worthy issue persists. As a result, D'Mart urges the Court to grant its summary judgment motion.

D'Mart argues that Andujar is complaining of three incidents. These are: (1) an incident in which Andujar was admonished for wearing maternity jeans; (2) an incident in which Andujar was admonished for eating inside the classroom; and (3) an incident in which Ms. Rivera told Andujar that she expected her to be fatter than she was due to her pregnancy.

D'Mart posits that when Andujar wore jeans to work, she was in violation of the dress code. Although that may be true, Andujar has also advanced arguments that other professors wore jeans and that she was admonished because she wore maternity jeans, thereby creating a factual issue. Similarly, D'Mart argues that Andujar was only admonished once for eating in the classroom. However, Andujar also claims that professors routinely ate in the classroom and that she was admonished due to her pregnancy. As to the third factor, D'Mart avers that Ms. Viera's comment calling her fat was a stray remark and that such remarks are insufficient to prove discrimination by direct evidence. Morales-Cruz v. University of Puerto Rico, 2012 WL 1172064 at *5 (1st Cir. 2012). However, the Court believes that in light of the entirety of the record Andujar has made a *prima facie* case of discrimination and successfully shown that D'Mart's proffered legitimate business reason for the adverse employment action was pretextual. Thus, the Court finds that summary adjudication would be inappropriate.

Lastly, D'Mart's motion for reconsideration objects to the following statement made by the Magistrate:

> Where the elements of a sufficient *prima facie* case combine with the fact finder's belief that the ostensible basis for dismissing and/or adverse employment action was pretextual, particularly if … accompanied by a suspicion of mendacity, the fact finder is permitted to infer the intentional discrimination required to even enable plaintiff-employee prevail on the merits.

The Magistrate attributed this statement to St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). D'Mart states that it could not find the referenced construction of the statement. D'Mart also argues that St. Mary's Honor Center is inapplicable

to this case because in St. Mary's Honor Center the court had held hearings and held testimony. D'Mart posits that the portion of the Magistrate's motion that reads "particularly if … accompanied by a suspicion of mendacity" should not be applied because no assertion can be made as to D'Mart's credibility in this case.

Upon a review of the case, the Court understands that the passage that D'Mart objects to is paraphrasing the following sentence: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination." Id. at 510. .

The St. Mary's Honor Center decision led to the application of inconsistent standards in our Circuit due to the rather confusing nature of that Supreme Court opinion. See Daley v. Wellpoint Health Networks, Inc., 146 F.Supp.2d 92, 103 (D. Mass. 2001). However, the inconsistency was resolved in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147–148 (2000). In Reeves, the Supreme Court stated that plaintiff's *prima facie* case, when combined with sufficient evidence to find that the employer's asserted justification is pretextual, may permit the trier of fact to conclude that the employer unlawfully discriminated. Moreover, summary judgment is disfavored in fact-intensive disparate treatment cases. Daley, 146 F.Supp.2d at 103. As a result, the Court finds that the holding in Reeves, as well as the fact intensive nature of this case, militates against granting summary judgment. In light of this discussion, the Court finds little need to delve deeper into the Magistrate's citation of St. Mary's Honor Center.

CONCLUSION

In light of the foregoing, the Court **ADOPTS** the Magistrate's Report and Recommendation and **DENIES** D'Mart's summary judgment motion.

IT IS SO ORDERED

In San Juan, Puerto Rico, this 25th day of April, 2012.

S/ Jay A. García-Gregory
JAY A. GARCÍA-GREGORY
United States District Judge